No. 2634

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CALEDONIAN INSURANCE COMPANY et al.,

Plaintiffs in Error,

vs.

S. W. LEVY,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

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This is the second appeal by plaintiffs in error from the judgment of the United States District Court in favor of defendant in error, S. W. Levy. The cause was originally tried before a jury which brought in a verdict in favor of Levy and against the insurance companies for $11,710.57. Upon that judgment a writ of error was obtained to this court. After a hearing, the judgment was reversed and the cause remanded for a new trial. The former appeal is reported in the case of Caledonian Insurance Company v. Levy, 199 Fed. 407. Upon a retrial in the District Court, the testimony taken at the first trial was made part of the record by stipulation

between counsel. No additional evidence of a material character was offered. The testimony given at the second trial was, therefore, identical with that at the first trial. For the purpose of advising the court as to the facts in this controversy, it is only necessary for us to repeat the statement made by us in our brief on the previous appeal.

On April 1, 1906, an agreement was made and entered into between plaintiffs in error, whom we shall call the companies, they being four foreign fire insurance companies, and defendant in error, S. W. Levy, whereby the latter was employed by the companies for a period of two years from that date. The agreement was in the form of a letter written by the companies to Levy, and provided, to quote the language of the contract itself,

> "for and in consideration of the sum of $1000 payable to you monthly, you agree to place in the companies represented in this office or through them any and all fire insurance business which you may be able to secure or control", and it further states "that the consideration above expressed shall cover any and all compensation for services rendered by yourself and clerical service of your employees to the companies represented in this office and its management".

This agreement was accepted by Levy. About two weeks after its acceptance, there occurred the great earthquake and conflagration which destroyed practically the entire business district of San Francisco. After this catastrophe, plaintiffs in error notified Levy that they had elected to rescind the

contract, upon the ground that the destruction of property in San Francisco upon which they claimed the great bulk of Mr. Levy's business was obtained, resulted in a failure of the consideration for the contract in material part. Levy, however, refused to consider the contract rescinded and so notified the companies. He stated that he would continue to perform the contract according to its terms and that he expected the payment of $1000 monthly as provided in the contract. Thereafter, he continued to place all insurance procured by him, or through his office, with the companies. Every month he made a demand for the payment of the sum of $1000, which was refused. After the expiration of several months, Levy commenced suit in the Superior Court of the State of California, to recover the salary then due him. This action was tried in April, 1907, and under a supplemental complaint filed at the time of the trial, he recovered a judgment for the first twelve months of the contract in the sum of $12,000. An appeal was taken by the companies from this judgment to the Supreme Court of the State of California and the judgment of the trial court was affirmed.

Levy v. Caledonian, 156 Cal. 527.

In affirming the judgment in that case the Supreme Court held that plaintiff (Levy) had performed the contract during the first year ending April 1, 1907. After the decision of the Supreme Court in that action in 1909, the amount of the judgment, including interest and costs, was paid in

full by the companies. Prior to that time, Levy made a material change in the manner in which he conducted his business relations with the companies. Up to April 1, 1907, as has been previously stated, he placed with the companies all of the insurance which he was able to procure, and at the end of the month would demand the payment of the thousand dollars which he claimed was due. On the 27th day of April, 1907, instead of making demand for the money due him for the month of April, he wrote to the companies through his attorneys, (Transcript, page 69) to the effect that he would continue to perform his services under the contract until the end of the month, when he would make demand for the regular compensation. The letter then continues:

> "If you still refuse payment and still persist in claiming that the contract has been rescinded he (Levy) will consider that you have committed a breach of the contract and will sue you once and for all for damages."

To this letter, plaintiffs in error replied that if the courts ultimately determine that the destruction of the principal part of the City of San Francisco, by reason of which destruction Levy's ability to perform the contract between himself and the companies was destroyed, does not release the companies from their obligation under the contract, then Levy will be paid the sum of $1000 per month, provided for in the contract, or if not, he would receive the usual brokerage of fifteen per cent of the premiums collected.

Despite the answer of plaintiffs in error, Levy in the month of May, 1907, commenced an acton in the Superior Court of the State of California, to recover the entire balance which would thereafter become due under the contract, though it still had eleven months to run, and that at the time the action was commenced there was due to Levy only the sum of $1000, exclusive of the amount recovered by him by judgment prior to that time, but which was not paid until its subsequent affirmance by the Supreme Court. The theory of that action, commenced in 1907, was that the companies' attempted rescission in 1906, amounted to a repudiation and that the failure of performance on the part of the companies was a valid excuse for non-performance on Levy's part. At the same time, and for each succeeding month until the end of the term of the contract, Levy deducted from the money which he paid to the companies for insurance procured by him or through his office, fifteen per cent of the premiums collected. That was the usual and regular brokerage commission prevailing at that time in San Francisco and that was the amount that any insurance broker would have and could have received from any company in San Francisco with which such broker placed his risks.

The present action was commenced after the expiration of the term provided for in the contract and subsequent to the dismissal of the action in the Superior Court last referred to. These facts as we have recited them, stand upon the record uncontra-

dicted. They cannot be disputed by defendant in error, for there is no doubt that they are absolutely correct. But despite the evidence, the trial court again gave its judgment in favor of Levy and against the insurance companies.

The record in this case presents the following specifications of error relied on by the companies for a reversal of the judgment:

1. That the said United States District Court, in and for the Northern District of California, erred in overruling the demurrer interposed by the defendants and plaintiffs in error to the original complaint filed in said cause of action.

2. That the said United States District Court, in and for the Northern District of California, erred in denying the motion of the defendants and plaintiffs in error to strike out portions of the original complaint filed by the plaintiff in said action.

3. That the said United States District Court, in and for the Northern District of California, erred in overruling the demurrer interposed by the defendants and plaintiffs in error to the amended complaint filed by plaintiff in said action.

4. That the said United States District Court, in and for the Northern District of California, erred in denying the motion of the defendants and plaintiffs in error to strike out portions of the amended complaint filed by plaintiff in said action.

5. That the said United States District Court, in and for the Northern District of California, erred in granting plaintiff and defendant in error leave to file his amended complaint in said action.

6. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error.

7. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error and in entering judgment in accordance therewith.

8. That the said United States District Court, in and for the Northern District of California, erred in rendering and entering its judgment in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error.

9. That the said United States District Court, in and for the Northern District of California, erred in entering its judgment in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error.

10. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision in said action in favor of the plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that said decision is against law.

11. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision and entering its judgment therein in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that said decision and judgment are against law.

12. That the said United States District Court, in and for the Northern District of California, erred in entering its judgment in said action in favor of the plaintiff and defend-

ant in error and against the defendants and plaintiffs in error in this, that the said judgment is against law.

13. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision in said action in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that the evidence is insufficient to justify said decision, and that upon the uncontradicted and uncontroverted evidence in said action the said court should have rendered its decision in favor of the defendants and plaintiffs in error in said action and against the plaintiff and defendant in error.

14. That the said United States District Court, in and for the Northern District of California, erred in rendering its decision and entering its judgment thereon in said action in favor of plaintiff and defendant in error and against the defendants and plaintiffs in error in this, that upon the uncontradicted evidence, and as to which there is and was no dispute, said court should have rendered its decision in favor of the defendants and plaintiffs in error and against the plaintiff and defendant in error.

In deciding the case, the court gave its reason for its decision (Trans. of Record, page 85 ff). This decision in part is as follows:

"The material question upon which judgment principally turns, is whether the cause of action stated in the second count of the complaint upon which plaintiff now relies is one 'upon the contract' that is based upon the theory of performance of the contract as contended by the defendant or is one to recover damages for the defendants' breach in its repudiation of the contract as contended by plaintiff. * * *

If the latter, then the law of the case does not apply since the theory upon which plaintiff is now proceeding was not involved in the judgment of the appellate court. As to the main cause of action alleged, it is asserted in two forms, the one alleging and based upon the theory of the full performance of the contract, and a right to recover thereunder which was the count relied upon at the former trial; the other under which plaintiff now seeks recovery, alleging the facts fully as to what was done by the parties to the contract and seeking damages for its repudiation or breach by defendant. I am of the opinion that the latter count cannot be said in its legal aspects to 'count upon the contract' in the sense insisted by defendants, that is it does not proceed upon the theory of performance, but is to be regarded as stating a cause of action arising upon defendant's breach.

He (Levy) had suffered a wrong through defendant's renunciation of its contract and finding that he could not change their attitude in that regard, he determined to treat it as a breach and proceed in a manner that would enable him to have recompense for their default in one form or the other. In this there was no wrong to the defendants. It was but a precaution to protect himself from loss by reason of their refusal to carry out their contract nor do I think plaintiffs' refusal at first to acquiesce in defendants' renunciation of the contract precluded him from his subsequent determination to do so."

We must confess our inability to understand the distinction which the court makes between an action on the contract and one to recover damages for the breach thereof. It is our understanding of the law that every action "upon a contract" is an action

by one party to recover damages for the breach of the contract by the other contracting party. The only distinction which is recognized is that while in ordinary cases the party seeking to recover must show performance on his part and a failure to perform on the part of the other party, under certain circumstances it is unnecessary for the plaintiff to prove performance. Where the defendant has refused to perform, plaintiff need only show that by reason of some act of the former he was prevented from performing and such prevention may be pleaded as an excuse for non-performance. We assume that this is the distinction which the court seeks to draw between the theory upon which this case was originally tried and that relied upon by Mr. Levy at the second trial.

In a very recent case, Hughes v. Chung Sun Tung Co., 21 Cal. App. Dec. 334, complaint was made by defendant that the court erred in permitting plaintiff to file an amended complaint upon the ground that by so doing the cause of action was changed. The court in holding such amendment proper, remarked:

> "The gravamen of the action is the breach of the contract, and the averment of such breach in one form or the other would not amount to a change in the nature of the action."

It seems only proper to remark at this point that upon the former appeal—all of the facts being before the court—the judgment would not have been reversed had the evidence been sufficient to support

the judgment on any theory. By its decision, this court has held that under the evidence introduced at the first trial, Levy was precluded from recovering upon the contract between himself and plaintiffs in error. In the absence of any new or additional facts at the subsequent trial, we submit that Levy's right to recover is barred by the law of the case.

But we firmly are of the opinion that the evidence will not support a recovery in any event or upon any theory. The contract between the parties to this action provided that Levy was to place all business which he, as an insurance broker, was able to obtain with the defendant companies for a period of two years and that at the expiration of each month he was to be entitled to the sum of $1,000, as full compensation for such service. This money was not paid monthly to Levy for the reason that defendants, shortly after the execution of the contract, claimed that the consideration therefor had failed in material part due to the destruction by fire of the business district of San Francisco in April, 1906. This position was maintained by the companies through a long litigation which was not finally determined until after the expiration of the time for the full performance of the contract. The companies never at any time refused to accept any business which Mr. Levy tendered them. On the contrary, they accepted all such business and merely stated that they would not pay the sum of $1,000 per month for such business until such time as the courts might determine that the contract was still

in full force and effect. For a period of one year, Levy accepted this situation and continued to perform the contract. At the expiration of the year he notified the company that he would not continue to perform unless the sum of $1,000 per month was paid him, and thereupon he actually deducted from the premiums collected by him the sum of 15% thereof, being the regular and usual brokerage commission paid by insurance companies to insurance solicitors bringing business to them. This fact; the court held upon the former appeal, constituted a failure on the part of Levy to perform the contract. It is too elementary to require any citation of authority to support the proposition that a party seeking to recover damages for a breach of a contract must show performance on his part or an excuse for non-performance. Plaintiff having admittedly failed to perform the contract, the only remaining question is, was he excused from performing by reason of any act or omission on the part of the companies. The evidence shows only one act of omission, namely, their refusal to pay the sum of $1,000 per month when the same became due.

Sections 1511 and 1512 of the Civil Code of the State of California provide that a debtor is entitled to all of the benefits which he would have obtained if the contract had been performed by both parties if the performance of the obligation is prevented by the creditor. Want of performance is excused when performance is prevented or delayed by the act of the creditor or where the debtor is induced

not to make it by any act of the creditor intended or naturally tending to have that effect done at or before the time at which such performance or offer may be made. The only act which Levy contends constituted prevention of performance on his part was the failure to pay the sum of $1,000 per month. This duty was a condition subsequent to the performance on the part of the plaintiff and no obligation to pay any compensation arose until the expiration of the month in which the services of Levy were to be rendered to the companies. By its decision on the first appeal, this court held that the retention of 15% brokerage by Levy, constituted a breach of the contract on his part. It has also been directly held in Cox v. McLaughlin, 54 Cal. 605, that the failure to pay the money stipulated for in the contract does not constitute a prevention of performance, but prevention of performance means that one of the contracting parties (where work is to be performed) prevents or prohibits the completion of the work—the contractor being ready and willing to complete the work. Similarly, in Palm v. Ohio etc. Railroad Co., 18 Ill. Rep. 219, the court denied the right of plaintiff to recover the losses sustained by not being permitted to complete the contract

> "unless he has been prevented from going on with his work by the positive or affirmative act of the other parties or where the other party has neglected to do some act without which the plaintiff could not, in the nature of things, go on with his contract as where he refuses to furnish a place whereon to erect a building or to furnish material which by contract was to be put in the works."

From this it follows that the companies committed no breach of any of the terms of the contract on their part to be performed, but that Levy did not perform on his part. Nor was he prevented from performing by any act of the companies, but his failure to perform was due to his own act in retaining the commission. We therefore urge that it matters not whether the action is "on the contract" or "is one to recover damages for defendants' breach", there is no evidence to support the judgment of the trial court.

Reliance is placed by Levy upon the proposition that as the companies notified him (wrongfully as it later appeared from the decision of the Supreme Court of the State of California) that they rescinded the contract and stated that their obligation to continue thereunder had ceased, that he at any time thereafter might elect to consider such attempted rescission as a repudiation and thereupon sue for the entire amount due under the contract. We may concede for the purpose of this discussion that Levy might have considered the attempted recission of the companies as a termination of a contract and have elected to consider such attempted rescission as an anticipatory breach thereof but the fact is that he did not so treat it, but despite the attempt on the part of the companies to rescind, Levy continued for a period of almost a year thereafter to perform the contract and by his insistence that the contract was still in full force and effect, his right to recover can only be measured by the terms

of the contract itself. This point was decided in Tatum v. Ackerman, 148 Cal. 357, where the court said

> "an attempted rescission of the contract in toto by the vendee is no waiver of the single stipulation as to credit. The plaintiffs refused to acquiesce in such rescission and insisted that the contract should be enforced according to its terms, which they had the right to do, but they had no right to make a new contract for the defendant. If against the will of the vendee, the contract is to stand, the vendee may still insist that it shall stand according to its terms."

II.

The theory upon which counsel for defendant in error proceeded at the second trial is that Levy at the expiration of the first year of the contract treated the rescission by the companies of the year previous as a renunciation and elected to consider the contract terminated and to sue once and for all for damages. But upon the record Levy is clearly estopped from making this contention.

The evidence discloses that the contract between the parties was executed March 31, 1906, to commence the following day. The attempted rescission by the companies occurred in June, 1906. It is undisputed that Levy performed the contract on his part at all times up to April, 1907. It further appears from the record that he was ultimately paid the sum of $1,000 per month for all the first year period by the companies. In April, 1907, ap-

proximately a year after the attempted rescission by the companies, Levy notified them of his intention to sue once and for all for damages in the event the companies continued to refuse payment of the sum of $1,000 per month. But this he could not do. It was his duty in the event that he desired to consider the rescission by the companies as a termination of the contract to immediately elect to terminate it. For a period of one year after the attempted rescission he refused to consider the contract terminated. This precluded him from doing so in April, 1907. He could not proceed upon the theory that the attempted rescission by defendants was not binding upon him, but at the same time in full force in his favor; that the contract was at all times in force, but that he might at the same time treat the action of defendants as a renunciation upon which he might at his pleasure and without performance on his part sue for damages. He was bound to elect which course he would pursue, and having elected, as he did, to go ahead under the contract, he cannot now be permitted to recover damages as for a breach.

The leading case upon this subject is Johnstone v. Milling, 16 Q. B. R. 467, where it is said:

> "A renunciation of a contract, or in other words, a total refusal to perform it by one party before the time for performance arrives, does not by itself amount to a breach of contract, but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract,

that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party if he pleases to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course, a cause of action on the contract would arise. He must elect which course he will pursue."

In Bingley v. Oler, 117 U. S. 503, the Supreme Court says:

"In Smoot's case, 15 Wall. 36, 'and that case discusses the question somewhat more fully', this court quoted with approval the qualifications stated by Benjamin on Sales, 1st Ed., 424, 2d Ed. Sec. 568, that 'a mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; *it must be a distinct and unequivocal, absolute refusal to perform the promise, and must be treated and*

> *acted upon as such by the party to whom the promise was made;* for, if he afterwards continue to or demand a compliance with the contract, it is plain that he does not understand it to be at an end."

In Hansen v. Salven, 98 Cal. 377 (383) the Supreme Court of California, passing upon the question as to what refusal upon the part of defendant to perform will justify the other party in not performing as a condition precedent says:

> "The authorities all agree that in order to constitute an implied waiver of an offer or tender" (of performance) "the refusal must be explicit and positive."

But even if this court should be of the opinion that Levy could have elected to terminate the contract upon the attempted rescission by the companies a year after notice thereof was given him, notwithstanding his election to proceed under the contract during that year, the evidence plainly shows that Levy never did *at any time* treat the attempted rescission as a termination of the contract. On the contrary, the testimony of Levy himself and of his employee, Wren, is to the effect that at all times during the life of the contract, Levy attempted to perform. That is best proved by the fact that at the first trial of this action his attorneys proceeded upon the theory of performance by Levy, and throughout the trial and the previous appeal insisted that the evidence showed performance on his part. If any further evidence is necessary to show that Levy at all times was dealing with the

contract as in force and attempted to perform during the second year is shown by the following acts on his part:

(1) He placed all of the business which he was able to secure with the companies in this action (Trans. page 69).

(2) In cases where they were unable to accept the risk he placed the business with other companies and gave credit therefor to plaintiffs in error (Trans. page 69).

(3) He, or his employees, made monthly demand for the payment of $1,000 per month. The deduction of 15% of the gross premiums which he made he explained at the trial to have been made for office expenses (Trans. pages 70-71).

If Levy had elected to consider the contract terminated none of these things would have been done. It was his duty if he desired to consider the repudiation of the companies as a termination of the contract to immediately act upon it as such, and the authorities which we have cited upon this point make it clear that he could not, after the expiration of one year, during the whole of which time he had proceeded under the contract, consider such rescission as a repudiation; and it is equally clear that after sending the letter to the companies advising them that he intended to sue once and for all for damages in the event that the $1,000 per month was not paid he abandoned that position and proceeded upon the theory that the contract was still in force.

Under these circumstances, in order to recover it was necessary that he should prove that he continued to perform during the whole of the second year. This court has already held under the same statement of facts that the record now discloses that he did not actually perform during the second year for the reason that he retained 15% brokerage fees. We respectfully submit therefore that under the law of the case as settled by this court upon our previous appeal that there is no justification for the decision of the trial court in his favor, and that the judgment from which we are now appealing should be reversed with direction to enter final judgment in favor of plaintiffs in error.

III.

The judgment in favor of Levy and against the companies was for $14,081.53. This amount was computed by allowing Levy $1,000 per month during the last eleven-month period of the contract between himself and the companies with interest from the date that each installment of $1,000 would have become due under the contract. This amount plaintiffs in error claim is excessive and is not the proper measure of damage. The contract of employment provided for the payment of $1,000 per month as full compensation for all services to be rendered by Levy. The agreement further provided that Levy

> "shall employ Melville S. Levy, whose services during usual business hours shall be given to the companies represented in this office when not otherwise engaged on (plaintiff's) business; that the consideration above expressed shall cover any and all compensation for services rendered by (Levy) and clerical services of (his employees) to the companies represented in this office and its management."

The theory upon which the trial court decided in favor of Levy was that performance on his part was excused by reason of the repudiation of the contract by companies and the court distinctly held that Levy did not perform the contract. It was because Levy did not perform the contract that the case was originally reversed by this court. Inasmuch as performance of the contract on his part required the disbursement of his office expenses and the salary of M. S. Levy, even if the trial court were correct in holding that plaintiff was entitled to recover, from the amount to which he was entitled must be deducted these expenses. The judgment given upon the second trial was therefore in excess of the amount which Levy would have been entitled to had the contract been fully performed on his part and is therefore excessive.

IV.

Under the specification that the trial court erred in overruling the demurrer of defendants and plain-

tiffs in error to the complaint in this action, we direct the attention of this court to the fact that the complaint does not allege either performance or non-performance of the contract on the part of Levy. The trial court in deciding this case, interpreted the complaint as follows (Trans. page 87):

> "It is asserted in two forms, the one alleging and based upon the theory of the full performance of the contract and the right to recover thereunder, which was the count relied upon at the former trial; the other under which plaintiff now seeks to recover alleging the facts fully as to what was done by the parties to the contract and seeking damages for its revocation or breach by defendant."

This is the very situation which our courts have uniformly condemned. It has been stated:

> "Every complaint should be founded upon a theory under which the plaintiff is entitled to recover and should state all the facts essential to support such theory. Failing in these respects, it is radically defective and does not state facts sufficient to constitute a cause of action."
>
> Buena Vista Fruit & Vineyard Co. v. Tuohy, 107 Cal. 243.

It is also the duty of plaintiff in an action where he pleads both performance and non-performance to elect at the trial upon which theory he intends to proceed and thereupon he is bound by such election. At the first trial of this action, Levy elected to rely upon the theory of performance. This court on appeal held that he had not performed the contract

on his part. We respectfully submit that he cannot, now, change his theory and elect to proceed upon the ground that he was prevented from performing by any act of the companies.

It is unnecessary to consider any other specification of error, as we feel confident that this court will, upon the facts heretofore presented, order the judgment reversed with directions to the trial court to enter judgment in favor of defendants. There was no new evidence introduced at the second trial of the action; there was no amendment to the pleadings in the case, therefore the law of the case as decided by this court on the prior appeal must apply. This court having determined on the evidence now before it, that plaintiff is not entitled to recover, we respectfully submit that the judgment in this case should be reversed.

Dated, San Francisco,
October 27, 1915.

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